No. 823

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IN THE

SUPREME COURT OF THE UNITED STATES

AT THE OCTOBER TERM, 1941

SAMUEL INSULL, JR., ET AL.,
Cross-Petitioners (Defendants),

vs.

THOMAS D. AIKEN, ET AL.,
Cross-Respondents (Plaintiffs).

REPLY OF CROSS-PETITIONERS (DEFENDANTS) TO BRIEF OF CROSS-RESPONDENTS (PLAINTIFFS) IN OPPOSITION TO CROSS-PETITION FOR WRIT OF CERTIORARI.

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To the Honorable the Supreme Court of the United States:

We believe the reasons for the allowance of the writ of certiorari are sufficiently set forth in our cross-petition and are not met by the brief of cross-respondents. Briefly, we desire to call special attention to the following points:

I.

This cross-petition for review is not premature. Points raised by defendants, if sustained, are decisive of the case.

It is no answer to the cross-petition for writ of certiorari to say that a review may be had of the questions presented after a trial on the merits and a decree of the District Court. (Opp. Br. pp. 1-3.) Before there can be a lawful trial there must be a complaint which states a cause of action. Why have an expensive and prolonged trial if in the end this Court will be compelled to find that plaintiffs had no right to maintain this suit? The points raised by the cross-petition, if sustained, must result in a final decree in favor of defendants. We feel confident that we are right in our contentions that plaintiffs do not state a cause of action in their complaint, and if this be true, justice requires this case be determined now.

The recent case of *City of Indianapolis, et al.* v. *Chase National Bank of the City of New York,* 62 Sup. Ct. 15; 86 Law. Ed. 27, illustrates what may happen in the instant case if the cross-petition is not granted. We think the *Indianapolis* case clearly shows that if the question of jurisdiction can be raised on the pleadings that it is to the best interest of all parties concerned that it be raised and determined at the first possible moment. If we are right in our position that this suit cannot be maintained, then instead of the granting of our cross-petition for writ of certiorari being a "piecemeal review" of this case, it provides the only means of saving the time of the courts and needless expense to the litigants by finally disposing of the case now. Review of the judgment of the Circuit Court of Appeals will prevent "further pro-

tracting the litigation" which this Court stated was the reason for granting the writ of certiorari in *Spiller* v. *A. T. & S. F. Ry. Co.*, 253 U. S. 117, 121.

II.

The complaint does not state a cause of action.

The statements of plaintiffs as to the contents of the complaint on pages 7 and 8 of their brief in opposition are not borne out by the complaint itself. There is no allegation in the complaint that on "January 1, 1930, the plaintiffs and approximately 20,000 members of the public" purchased the debentures. On the contrary it appears from the complaint that on January 1, 1930, I. U. I. authorized, executed and issued to the public certain debentures of the total principal amount of $60,000,000 and that the company received therefor the sum of $56,400,000 *from underwriters* (R. 11). It is apparent from this allegation that underwriters purchased the debentures at the time of issue and there is nowhere in the complaint any allegation as to the time when any plaintiff became the owner of a debenture.

The failure to allege in the complaint that plaintiffs were the owners of debentures at the time the alleged wrongs were committed is conclusive against the right of plaintiffs to maintain this suit. The complaint was filed February 3, 1933, and it alleges that the plaintiffs were then the owners of certain debentures (R. 19). It cannot be assumed, in the absence of an allegation in the complaint, that the plaintiffs, or any of them, owned debentures at any time other than at the date of the filing of the complaint. The complaint shows by inference at least that they bought their debentures at less than face for it says that they paid "a good and valuable considera-

tion approximately equal to the par or face value thereof." R. 19.

There is no specific allegation of any wrong having been committed by any defendant which occurred at a time when any plaintiff was the owner of a debenture. The complaint shows that plaintiffs did not buy any of the debentures directly from the company because it is alleged that the total amount of the purchase price was paid by underwriters (R. 11). Nowhere in the complaint is it shown from whom the plaintiffs bought their debentures or whether they were bought a month before or a day before the attorneys procured the names on the "Uniform Contract" forms. Even if it could be said that plaintiffs bought some debentures on the day the underwriters made the original purchase, still there is nothing in the complaint to show that the debentures they then bought were not a part of the $4,818,000 that were paid between the date of issue and the date of bringing suit. See R. 11.

Other insufficiencies of the complaint are discussed at pages 15-24 of the cross-petition. The sub-paragraphs of the brief in opposition (pp. 7-8) are not a fair summary of the allegations of the complaint.

III.

There is an absence of allegations of fact to show that the requisite jurisdictional amount is present.

The allegations of the complaint with reference to the requisite jurisdictional amount being involved are subject to the same general criticism which can rightfully be made to the entire complaint. Only general conclusions are alleged. Our cross-petition (pp. 24-25) and the cases there cited are not answered by the brief in opposi-

tion. There are no allegations from which the amount of any dividend declared and paid can be determined. The allegation that a dividend of $1.39 a share was declared (R. 34) is meaningless without an allegation as to the number of shares then outstanding. Nothing appears in any part of the complaint which discloses the amount of outstanding shares at the time this dividend is alleged to have been declared. Paragraph 15 of the complaint (R. 17) is the foundation for the statement by plaintiffs in sub-paragraph (f) on page 8 on their brief as to the number of outstanding preferred shares. Paragraph 15 does not justify sub-paragraph (f). There is no allegation in the complaint as to what shares of stock were outstanding on January 9, 1932, the date referred to in sub-paragraph (g) on page 8 of the brief in opposition. Paragraph 15 of the complaint (R. 17) refers to stock outstanding on January 1, 1930, two years before the dividend is alleged to have been declared. Nowhere does there appear in the complaint any allegation as to what stock was outstanding at the time any dividend was declared.

IV.

The District Court was correct in refusing to allow amendments to the complaint.

Under point I-A of the brief in opposition (p. 7) it is admitted that if the original complaint was so deficient that it failed to state any cause of action then there was nothing to which the amendments could attach. The original complaint must stand or fall on its own allegations. The original complaint was filed on February 3, 1933 (R. 2), and it was not until March 1, 1940, more than seven years later, that the proffered amendments were submitted (R. 298, 299). After such extended

delay the District Court certainly did not abuse its discretion in denying leave to file the amendments. The records of the company were in the hands of the trustee in bankruptcy and available to the plaintiffs throughout the years. The transactions of I. U. I. were large and numerous and extended into a period of world-wide economic collapse. Between the time the suit was commenced and the amendments were offered, Samuel Insull, a director and principal officer of the company, and John H. Gulick and Marshall E. Sampsell, two other directors, had died, and four other directors had settled their liability and been dismissed out of the suit. To ask the defendants at this late date to marshal proof to meet allegations not made until seven years after the suit was begun and nine years after the transactions challenged is not consistent with any rules of practice. The Rules of Civil Procedure, which did not become effective until September 1938, cannot help a complaint which fails to state a cause of action relating to events occurring in January 1932 and prior thereto. If the cause of action relating to alleged wrongful payment of dividends was barred by Section 15 of the Illinois Statute of Limitations, that bar became final and conclusive in 1937 or prior thereto and the rules cannot put new life into a cause of action which is dead. Under Illinois law, the Statute of Limitations is not merely a procedural bar but is a vested right which cannot be taken away. *Board of Education* v. *Blodgett*, 155 Ill. 441, 447; *Hanley* v. *Waters*, 255 Ill. App. 239, 247.

V.

On the questions of the authority to bring this suit and the selection of plaintiffs.

On the contested issue presented by the cross-petition (p. 10) as to whether the attorneys appearing for plaintiffs had authority to commence and prosecute this suit, we submit that the brief in opposition (p. 36 *et seq.*) does not make sufficient answer. The determination of this question must rest solely on a construction of the so-called "Uniform Contract with Debenture Holders" employing the attorneys (R. 467). They do not claim there is any other authority.

The complaint does not furnish any solution of the question. In its first paragraph it alleges that the plaintiffs named brought the suit. But the complaint purports to have been signed not by the plaintiffs but by one Arthur Altschul, who designates himself therein as the duly authorized agent of the plaintiffs and whose affidavit, attached to the complaint, says that he was such duly authorized agent. Altschul was not named in the "Uniform Contract" (R. 467) as having received any power and the record is devoid of any evidence of substitution under the contract.

Even if the two firms of attorneys designated in the "Uniform Contract" had attempted to bring this suit against the former directors of I. U. I. they would have had no authority so to do under the terms of the contract. Their authority was to *collect moneys due upon the debentures* (R. 467). The debentures were the creation and debt only of the corporation. They were merely promissory notes of the corporation and authority to bring suit to collect money due upon a note certainly

could not be held to authorize the bringing of a suit against a party other than one liable on the note. There was no personal liability of any director upon any debenture. In fact, there was a no-recourse clause in each debenture barring action against directors on the debentures. R. 9, 15.

The second paragraph of the "Uniform Contract" confirms the theory that the employment was intended to give power only to collect the money due on the debentures. All of the things there authorized to be done by the attorneys named was limited to the "furtherance of such collection" (R. 467). There is no intimation of any power or authorization given to the attorneys to do more than to collect the debentures or the money due thereon.

If as we earnestly contend there was no authority given by the named plaintiffs to institute this suit against the former directors, or if this suit was instituted in the name of plaintiffs without their knowledge, as the record clearly indicates (R. 469), such fact alone would be sufficient ground for the dismissal of the suit by the District Court.

What is said on page 30 of the brief in opposition does not change the facts appearing in the record showing collusion, for as we stated in our brief in support of our cross-petition (pp. 26-28) no plaintiff in this law suit gave any direction for the bringing of this particular suit or had any knowledge of its commencement until after the suit was brought (R. 469). The named plaintiffs were in fact, as designated by cross-respondents, nothing more than "straw men plucked out of the air," by the secretary of a corporation organized to conduct this litigation, in order to create a spurious diversity of citizenship in order to gain access to the Federal Court. They

were selected and hand picked by this agent of the attorneys who started this litigation, and in their selection care was taken not to pick from the list of 1500 debenture holders any who resided within the State of Illinois, although it was the intention and purpose of the attorneys who brought the suit to bring it for the benefit of residents of Illinois as well as non-residents of the State of Illinois. The interested debenture holders did not get together and decide to bring a representative suit in the name of some of their number, but persons having no legitimate interest in the litigation selected the named plaintiffs without even consulting them, much less other interested parties. The debenture holders were as pawns upon a board being moved by the attorneys who made the selection, well knowing that if all of the parties whom they represented were made parties that the United States Court would not take jurisdiction.

VI.

It was not necessary for defendants to cross-appeal.

Plaintiffs argue that because the District Court decreed that the attorneys for plaintiffs established their authority to commence the suit and because defendants did not file an appeal from that portion of the decree, the question is not reviewable by this Court (brief p. 39). The decree of the District Court was decisive and terminated and dismissed the case. This was all that the defendants could expect or desired. It is clearly settled that an appellee may, without taking a cross-appeal, urge in support of a decree any matter appearing in the record, although his argument may involve an attack upon the reasoning of the lower court or an insistence upon matters overlooked or ignored by it. (*Langnes* v. *Green*, 282 U. S. 531,

538; *Hillmer* v. *Chicago Bank of Commerce,* 375 Ill. 266, 272.) The record in the present case is entirely different from the case of *Peoria & P. U. R. Co.* v. *U. S.,* 263 U. S. 528, cited by cross-respondents on page 39 of their brief, where objection to the venue was held waived. If the attorneys for the plaintiffs had no authority to commence the suit, the plaintiffs were never, in a legal sense, in court.

VII.

The provisions of Section 23 of the Illinois Corporation Act of 1919 are violative of Section 2 of Article II and Article III of the Illinois Constitution and the Fourteenth Amendment to the Federal Constitution.

Section 23 of the 1919 act is a legislative attempt to invade the judicial field. Section 16 of the act of 1872, the former statute, was similar to Section 23 if the last paragraph of Section 23 were eliminated. The purpose of the conclusive presumption clause in the 1919 act was to change the rule of evidence applied under Section 16 of the act of 1872. To omit the conclusive presumption paragraph is to give to the statute a different effect than the legislature intended. Under the general revision of the corporate law in 1919 the legislature inserted the conclusive presumption for a purpose. There was no such presumption under the previous law and no liability existed unless the directors acted on facts actually known. (*White-Wilson-Drew Co.* v. *Lyon-Ratcliffe Co.,* 268 Fed. 525; *Chick* v. *Fuller,* 114 Fed. 22, 29.) To sustain the 1919 act without the conclusive presumption clause is to write a law different than that intended by the legislature. Therefore, the last clause is an integral part of the statute and its provisions come within the cases cited. *Heiner* v. *Donnan,* 285 U. S. 312, 328; *Carolene Products Co.* v. *McLaughlin,* 365 Ill. 62, 70.

CONCLUSION.

We submit that plaintiffs in their brief in opposition to our cross-petition have pointed out nothing justifying its denial. We shall not here restate the various reasons why our cross-petition should be granted, but respectfully direct the Court's attention to our cross-petition and the facts therein stated which are supported by the cases there cited.

Respectfully submitted,

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